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State v. Pena Respondent's Brief Dckt. 43198

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 43198
Plaintiff-Respondent,)	
)	Ada Co. Case No.
v.)	CR-2014-9580
)	
RICHARD GARZA PENA,)	
)	
Defendant-Appellant.)	
_____)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE STEVEN J. HIPPLER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

JESSICA M. LORELLO
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEYS FOR
PLAINTIFF-RESPONDENT**

BRIAN R. DICKSON
Deputy State Appellate
Public Defender
P. O. Box 2816
Boise, Idaho 83701
(208) 334-2712

**ATTORNEY FOR
DEFENDANT-APPELLANT**

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STATEMENT OF THE CASE

Nature Of The Case

Richard Garza Pena appeals from the judgment of conviction entered upon the jury verdicts finding him guilty of unlawful possession of a firearm, driving without privileges, possession of paraphernalia, and possession of a controlled substance (testosterone). Pena contends the district court erred in one of its evidentiary rulings.

Statement Of Facts And Course Of Proceedings

Officer Jose DelRio conducted a traffic stop on Pena's car after he observed Pena commit a driving infraction. (Trial Tr., p.182, L.21 – p.184, L.15.) Upon approaching Pena's car, Officer DelRio saw the driver, later identified as Pena, making furtive movements. (Trial Tr., p.185, Ls.2-17, p.187, Ls.23-25.) When Officer DelRio made contact with Pena, Pena was nervous and had difficulty producing the paperwork Officer DelRio requested. (Trial Tr., p.186, Ls.2-24.) After checking Pena's information through dispatch, Officer DelRio learned Pena's driver's license was suspended and that Pena had an outstanding warrant for his arrest. (Trial Tr., p.190, L.10 – p.191, L.1.) Officer DelRio arrested Pena and, because Officer DelRio suspected Pena was under the influence, field sobriety and other drug evaluation tests were performed at the jail, including a blood draw conducted pursuant to a warrant. (Trial Tr., p.197, L.9 – p.198, L.23, p.224, L.20 – p.234, L.23, p.248, L.9 – p.254, L.19, p.267, L.14 – p.269, L.17, p.288, Ls.3-10.) The results of Pena's blood test revealed the

presence of methamphetamine. (Trial Tr., p.301, L.20 – p.302, L.10, p.304, L.25 – p.305, L.2.)

Following Pena's arrest, law enforcement conducted an inventory search of Pena's car because Pena said he wanted to have his car towed and, in any event, the applicable police department policy required Pena's car to be towed and inventoried when an individual is arrested for driving under the influence. (Trial Tr., p.163, Ls.13-19, p.200, Ls.3-14, p.311, Ls.2-23.) The inventory search of Pena's car uncovered a loaded, modified shotgun between the driver's seat and center console, additional shells for the gun inside a "traveling soap case," a metal spoon with residue and a syringe inside the center console, and a wooden box in the back of the car that contained additional syringes and testosterone. (Trial Tr., p.311, L.24 – p.323, L.25, p.401, L.1 – p.402, L.7; Exhibits 8, 10, 12, 18, 19, 20, 23.)

The state charged Pena with unlawful possession of a firearm, driving under the influence, driving without privileges, possession of drug paraphernalia, and misdemeanor possession of a controlled substance (testosterone). (R., pp.22-24, 29-31.) The state also filed an Information Part II alleging Pena is a persistent violator. (R., pp.64-66.)

Prior to trial, Pena stipulated that he had a prior felony conviction, which would make it unlawful for him to possess a firearm, and the court instructed the jury accordingly. (Trial Tr., p.17, L.6 – p.19, L.25, p.379, Ls.10-17; R., p.170.) The jury found Pena guilty of unlawful possession of a firearm, driving without privileges, possession of drug paraphernalia, and possession of a controlled

substance, but acquitted him of driving under the influence. (R., pp.190-191.) After the jury's verdict, Pena pled guilty to the persistent violator allegation. (2/20/2015 Tr., p.50, L.14 – p.56, L.4.) The court imposed a unified 20-year sentence, with seven years fixed, on the unlawful possession of a firearm charge, and concurrent 182-day sentences on the three misdemeanors, with credit for 182 days served. (R., pp.194-197.) Pena filed a timely notice of appeal. (R., pp.202-204.)

ISSUE

Pena states the issue on appeal as:

Whether the district court erred by determining the evidence of Mr. Pena's prior encounters with police was admissible propensity evidence.

(Appellant's Brief, p.6.)

The state rephrases the issue on appeal as:

Has Pena failed to show the district court erred in its ruling allowing non-character evidence that Pena had been seen driving his car on prior, recent occasions to rebut Pena's defense that he did not know there was a loaded, modified shotgun hidden in his car between the driver's seat and console?

ARGUMENT

Pena Has Failed To Show Error In The District Court's Ruling Regarding The Admissibility Of The Non-Character Evidence That Pena Had Been Seen Driving His Car On Prior, Recent Occasions

A. Introduction

Pena contends the district court erred in admitting testimony from officers “about having previously encountered Mr. Pena while he was driving th[e] same vehicle” he was driving when he was stopped in this case. (Appellant’s Brief, pp.7-8.) Pena contends the evidence “was not relevant to a material and disputed non-propensity basis” and was, therefore, “inadmissible under I.R.E. 404(b).” (Appellant’s Brief, p.9.) Pena also argues that, even if “relevant to a non-propensity purpose, the prejudice presented by that testimony substantially outweighed its minimal probative value,” such that the evidence should have been excluded. (Appellant’s Brief, p.9.) Pena’s arguments fail. Application of the correct legal standards to the facts shows the district court did not err in admitting evidence that Pena had been seen driving his car on prior, recent occasions because such evidence does not run afoul of I.R.E. 404(b) since it did not bear on Pena’s character. Moreover, the evidence was not unfairly prejudicial.

B. Standard Of Review

Relevance is a question of law reviewed de novo, while balancing under I.R.E. 403 is reviewed for an abuse of discretion. State v. Norton, 151 Idaho 176, 190, 254 P.3d 77, 91 (Ct. App. 2011). Rulings under I.R.E. 404(b) are also reviewed under a bifurcated standard: whether the evidence is admissible for a

purpose other than propensity is given free review while the determination of whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice is reviewed for an abuse of discretion. State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009). In reviewing a trial court's discretionary decision, this Court evaluates whether the trial court correctly perceived the decision as discretionary, whether the trial court acted within the boundaries of its discretion and consistent with legal standards, and whether the court exercised reason in making its decision. Norton, 151 Idaho at 190, 254 P.3d at 91.

C. Pena Has Failed To Show Error In The District Court's Ruling That Non-Character Evidence That Pena Had Been Seen Driving His Car On Prior, Recent Occasions Was Relevant To His Knowledge Of And/Or Control Over The Gun Found In His Car

To be admissible, evidence must be relevant. I.R.E. 401, 402. Evidence that tends to prove the existence of a fact of consequence in the case, and has any tendency to make the existence of that fact more probable than it would be without the evidence, is relevant. State v. Hocker, 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct. App. 1989). "Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's criminal propensity. However, such evidence may be admissible for a purpose other than that prohibited by I.R.E. 404(b)." State v. Truman, 150 Idaho 714, 249 P.3d 1169 (Ct. App. 2011) (citations omitted). Under I.R.E. 404(b), evidence of prior wrongs or acts may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. I.R.E. 404(b); State v. Phillips, 123 Idaho 178,

845 P.2d 1211 (1993). In Grist, the Idaho Supreme Court set forth a two-tiered analysis to determine the admissibility of evidence under I.R.E. 404(b). State v. Naranjo, 152 Idaho 134, 138, 267 P.3d 721, 725 (Ct. App. 2011). “The first tier involves a two-part inquiry: (1) whether there is sufficient evidence to establish the prior bad acts as fact; and (2) whether the prior bad acts are relevant to a material disputed issue concerning the crime charged, other than propensity.” Id. (citing Grist, 147 Idaho at 52, 205 P.3d at 1188).

The second step in a 404(b) analysis involves a determination of whether the evidence, although relevant, should be excluded because the danger of unfair prejudice substantially outweighs its probative value. State v. Sheahan, 139 Idaho 267, 275-76, 77 P.3d 956, 964-65 (2003). Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court’s discretion, the danger of unfair prejudice -- which is the tendency to suggest a decision on an improper basis -- substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 908 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993). As previously explained by the Idaho Supreme Court: “Under the rule, the evidence is only excluded if the probative value is *substantially* outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence.” State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original). Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party’s case. See State v.

Leavitt, 116 Idaho 285, 290, 775 P.2d 599, 604 (1989) (“Certainly that evidence was prejudicial to the defendant, however, almost all evidence in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant.”). Rather, the rule protects only against evidence that is unfairly prejudicial, that is, evidence that tends to suggest a decision on an improper basis. Floyd, 125 Idaho at 654, 873 P.2d at 908. As long as the evidence is relevant to prove some issue other than the defendant’s character and its probative value for the proper purpose is not substantially outweighed by the probability of unfair prejudice, it is not error to admit it. State v. Cross, 132 Idaho 667, 670, 978 P.2d 227, 230 (1999).

In her opening statement, defense counsel argued that Pena did not know the loaded, modified shotgun was in his car because “his car gets a lot of traffic; passengers, people borrowing it,” and that is “very typical” for Pena. (Trial Tr., p.149, L.23 – p.150, L.6, p.152, Ls.5-13.) Defense counsel concluded her opening by telling the jury:

. . . [T]he state has to show what [Pena] knew, they have to show he knew the gun was there or that he had the intent to possess and control it. The issue for you to decide today is not was this [Pena’s] car. It was his car. The issue for you to decide is not were some of the things in the car his, of course they were, his things were in his car. He doesn’t dispute that. The issue for you to decide is what did he know and what did he control. And he will tell you he did not know the gun was there and it was not his.

And so at the end of the trial, we’re going to ask that you find [Pena] not guilty because the state cannot prove to you beyond a reasonable doubt what he knew or what he could control.

(Trial Tr., p.156, L.13 – p.157, L.2.)

After opening statements, but before the state called its first witness, the court held a hearing outside the presence of the jury regarding the admissibility of certain evidence, which included the state's request to elicit testimony from two officers who had seen Pena in the same car prior to the date of his arrest in this case. (Trial Tr., p.170, L.24 – p.172, L.20.) The prosecutor indicated she did not intend to inquire about the nature of the prior contact, but only the fact that the officers had seen Pena driving his car in order to respond to the defense outlined in Pena's opening statement that he was unaware of the gun in his car because "he's loaning it out." (Trial Tr., p.171, Ls.5-13.) Pena objected because he did not deny that it was his car and because, he asserted, it was "an improper comment on 404(b)." (Trial Tr., p.171, Ls.14-18.)

In response to the court's inquiry asking "[h]ow far in advance of this date had these two officers interacted with [Pena]," Pena responded, "[o]ne month," and the prosecutor answered, "[w]ithin the last one or two months." (Trial Tr., p.171, L.21 – p.172, L.3.) The court ruled:

I think that probably is fair given what has been at least argued to the jury at this point, and I think it's evidence of not only his ownership, which may not be in dispute, but his use of the vehicle, and therefore his potential control of anything in the vehicle. Sounds like if it's a month or so before, it's close enough in time to make it relevant. I'll instruct you to be careful about that, their discussion what in particular -- why they had that contact.

(Trial Tr., p.172, Ls.12-20.)

Consistent with the court's ruling, the prosecutor's inquiry of the two officers was limited. Officer Dan Muguira, who responded to the scene shortly after Officer DelRio stopped Pena, testified that he had seen Pena in that same

car before on “three different occasions in about two-and-a-half, three months prior to that traffic stop.” (Trial Tr., p.307, Ls.1-16.) Officer Tad Miller also testified that he had previously seen Pena in his vehicle “[a]pproximately three times” over the six to eight month period preceding Pena’s arrest. (Trial Tr., p.347, Ls.2-14.)

Pena argues that Officers Muguira’s and Miller’s testimony that they had seen Pena in his car on several occasions in the months prior to his arrest in this case was impermissible I.R.E. 404(b) evidence because, he contends, the evidence “was not relevant to a material and disputed issue” since Pena did not dispute he owned the car. (Appellant’s Brief, p.8.) Pena’s argument fails because it reflects a misunderstanding of the law and the facts. Although “Rule 404(b) is not limited to ‘bad’ acts,” but “encompasses ‘other crimes, wrongs, or acts,’” “evidence runs afoul of Rule 404(b) only if its purpose is to ‘prove the character of a person in order to show that the person acted in conformity therewith.’” State v. Norton, 151 Idaho 176, 190, 254 P.3d 77, 91 (Ct. App. 2011) (quoting I.R.E. 404(b)). “Therefore, evidence is inadmissible where its purpose is to demonstrate a propensity to commit other crimes, wrongs, or acts.” Norton, 151 Idaho at 190, 254 P.3d at 91. Conversely, if the evidence does not bear on the defendant’s character, it is not subject to I.R.E. 404(b). Id.

The fact that Pena had been seen driving his car on other occasions does not bear on Pena’s character. As such, it is not subject to analysis under I.R.E. 404(b). Norton, 151 Idaho at 190, 254 P.3d at 91. Moreover, notwithstanding Pena’s claim to the contrary, the evidence was relevant to a material and

disputed issue, which was not whether Pena owned the car where the gun was found, but whether he knowingly possessed and/or had custody or control of the gun hidden in his car. (See R., p.168 (Instruction No. 14).) Evidence that Pena was regularly seen driving his car in the weeks and months leading up to his arrest was relevant to prove knowledge and/or control, and was appropriate to rebut Pena's defense that he did not know there was a loaded, modified shotgun between his driver's seat and his console.

Pena alternatively argues that, even if relevant, the evidence was unfairly prejudicial because, according to Pena, it had "minimal probative value" since it was "cumulative" to evidence that he owned the car and cumulative to evidence that he also used the car. (Appellant's Brief, pp.9-10.) Pena further argues that the "risk of undue prejudice" was high. (Appellant's Brief, p.10.) Like Pena's relevance argument, these arguments also fail.

Pena's claim that the evidence was cumulative because there was no dispute that he owned the car, again, misses the point. As noted by the district court, the evidence was relevant to what Pena knew and what he controlled in relation to the contents of his car, not to whether he owned the car. (Trial Tr., p.172, Ls.12-20.) Pena's second argument, that the evidence was cumulative to other evidence that he used the car, is based on the fact that he "was driving the car when it was pulled over, which demonstrates he uses the car," and based on his own testimony that "he used it regularly." (Appellant's Brief, p.10.) Offering evidence that Pena was recently seen driving the car on occasions other than "when it was pulled over" is not cumulative. The entire point of the evidence is to

demonstrate that Pena was driving the car on other separate and recent occasions and, therefore, had knowledge of and control over its contents; the point was not to show cumulative evidence that he was driving on the night he was arrested.

Moreover, the state was entitled to present evidence in its case in chief to establish Pena's knowledge and control without waiting for Pena to testify that he regularly drove his own car. If anything, Pena's testimony that he drove his car "almost every day" (Trial Tr., p.527, Ls.20-21), undermines his assertion that he was unfairly prejudiced by other evidence that corroborated his claim.

Even if the Court agrees with Pena's argument that the evidence was cumulative, which is a "consideration" under I.R.E. 403, that does not make the evidence unfairly prejudicial. Indeed, unfair prejudice is an entirely separate consideration under the rule that may justify exclusion. I.R.E. 403. And, notably, Pena never advanced a "cumulative" argument to the district court or, for that matter, an argument that the evidence was unfairly prejudicial. Rather, Pena's only argument was that it was an "improper comment on 404(b)." (Trial Tr., p.171, Ls.17-18.) Thus, to the extent Pena's appellate claims were not preserved, this Court should decline to consider them. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989) ("an objection on one ground will not be deemed sufficient to preserve for appeal all objections that could have been raised").

Pena's reliance on United States v. Scott, 677 F.3d 72 (2nd Cir. 2012), in support of his unfair prejudice claim is unpersuasive. (Appellant's Brief, p.10.)

Pena contends that the Second Circuit has “[c]onveniently” “engaged in an in-depth evaluation of this question in regard to similar testimony.” (Appellant’s Brief, p.10.) In Scott, the defendant was charged with distributing a controlled substance and possession with intent to distribute a controlled substance. 677 F.3d at 74. At trial, the government introduced evidence that the arresting detectives knew Scott from prior interactions and, therefore, recognized him when they observed the alleged drug buy that formed the basis of the charges in the pending case. Id. The specific challenged testimony of the detectives was that they had talked with Scott on several occasions. Id. at 76. The Second Circuit concluded such testimony was inadmissible under F.R.E. 404(b) because it “would certainly bear adversely on the jury’s judgement of [Scott’s] character.” Id. at 78 (quotations and citation omitted). In reaching this conclusion, the court distinguished between “a police officer’s mere observations of a defendant in an area and testimony that the two different detectives had had occasion to speak to him up to five times and for up to twenty minutes (and on at least some different occasions).” Id. The court characterized this difference as “substantial,” and it was this difference that made the act subject to F.R.E. 404(b). Id. Pena “conveniently” ignores this “substantial” distinction in his reliance on Scott even though the distinction directly applies to the facts of this case.

Pena has failed to show any error in the admission of non-character evidence that he had been seen driving his car on prior, recent occasions.

D. Even If This Court Concludes Pena Has Met His Burden Of Showing Evidentiary Error, Any Such Error Is Harmless

Even if this Court concludes that any of the challenged evidence should have been excluded, the error is harmless. Idaho Criminal Rule 52 provides that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” I.C.R. 52. “The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged evidence.” State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Neder v. United States, 527 U.S. 1, 18 (1999)); see also State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

At trial, Pena admitted his license was suspended, admitted that the needles and the testosterone found in his car belonged to him, and admitted that he used the needles to inject testosterone and methamphetamine. (Trial Tr., p.512, Ls.9-18, p.533, Ls.7-25.) Pena also stipulated that he had previously been convicted of a felony, which would prohibit him from possessing a firearm. (R., p.170.) Thus, with respect to the charges for which Pena was convicted, the only element Pena contested was whether he knowingly possessed and/or had custody or control of the loaded, modified shotgun hidden between his driver’s seat and the center console.¹ (Trial Tr., p.534, Ls.8-13; see R., pp.168, 170.) As such, any error in the admission of testimony that two officers had previously seen Pena driving his car is harmless as to Pena’s convictions for driving without

¹ In his statement of facts, Pena acknowledges his admission “that he knew his license was suspended,” but does not acknowledge his admission to possessing paraphernalia or testosterone. (Appellant’s Brief, p.5 n.3.)

privileges, possession of paraphernalia, and possession of a controlled substance. The testimony was also harmless in relation to Pena's conviction for unlawful possession of a firearm.

The evidence that Pena had knowledge of and/or control over the loaded, modified shotgun included its location between the driver's seat, where Pena was sitting, and the console, and that the gun was positioned in a manner to be readily accessible to the driver. (Trial Tr., p.312, L.1 – p.313, L.12.) There was also evidence that Pena had a "traveling soap case," that contained additional ammunition for the gun, located in front of the console. (Trial Tr., p.316, L.18 – p.318, L.3.) Pena's claim at trial that he was unaware of the gun was based on his testimony that he often loaned out his car, but he was unclear about the precise times he did that, and even though he checked his car after people borrowed it, he never found the gun right next to the driver's seat. (Trial Tr., p.528, L.14 – p.531, L.3, p.534, Ls.1-7, p.572, L.25 – p.574, L.24.) Pena also testified that, on the night of his arrest, after he went to a bar to pick up two girls and give them a ride home, he stopped at a house at one of the girls' request. (Trial Tr., p.507, L.13 – p.511, L.4.) According to Pena, while at that house, he allowed one of his passengers to load a duffle bag and "stuff" into his car, but he was unsure where she put it. (Trial Tr., p.510, L.21 – p.511, L.4, p.559, Ls.4-19.) This testimony was severely undermined by Pena's two passengers, who both denied stopping anywhere between when Pena picked them up at the bar and when they were pulled over, and denied leaving anything in Pena's car. (Trial Tr., p.382, L.7 – p.383, L.3, p.386, L.18 – p.388, L.20.)

While relevant, the testimony that Officers Muguira and Miller had, over the weeks to months prior to Pena's arrest, seen him driving his car was not necessary to Pena's conviction for unlawful possession of a firearm. At worst, that evidence would only be prejudicial to the extent it implied Pena had prior criminal contacts with law enforcement. However, such evidence was explicitly before the jury by virtue of the warrant that served as the basis for Pena's arrest, the fact that he had an invalid license, and his stipulation to being a felon. Moreover, Pena admitted to criminal behavior by using methamphetamine. Indeed, Pena's methamphetamine use, his invalid license, and his outstanding arrest warrant were introduced to the jury at the outset through Pena's opening statement. (Trial Tr., p.151, Ls.2-3 ("He will tell you that he has a methamphetamine addiction."); p.153, Ls.3-6 (Pena "will tell you I was nervous, I knew I had a warrant for my arrest, and I knew that I didn't have a driver's license, and I didn't want to go to jail.")) This Court can easily conclude, "beyond a reasonable doubt, a rational jury would have convicted [Pena] even without the admission of the challenged evidence." Johnson, supra.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdict finding Pena guilty of unlawful possession of a firearm, driving without privileges, possession of paraphernalia, and possession of a controlled substance.

DATED this 17th day of May, 2016.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of May, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

JML/dd